

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WAYNE E. WEAVER
Claimant

VS.

SUPERIOR INDUSTRIES INTERNATIONAL, INC.
Respondent
Self-Insured

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Docket No. 159,638

ORDER

Claimant appeals from an Award entered by Special Administrative Law Judge William F. Morrissey on August 18, 1994.

APPEARANCES

Claimant appeared by his attorney, Carlton Kennard of Pittsburg, Kansas. Respondent, a self-insured, appeared by its attorney, John I. O'Connor of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has adopted the record listed in the Award and has reviewed the stipulations listed in the Award.

ISSUES

The sole issue to be considered on appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board finds claimant sustained a twenty-seven percent (27%) permanent partial general disability.

Claimant injured his low back when he slipped and fell on the floor at work. He missed one day of work and then returned to work for approximately one week. His work at that time involved running cast wheels through a shot blast machine and hanging them

on a line to go into the paint room. Claimant ran approximately four thousand (4,000) wheels per shift. After returning to work for one week, claimant then sought referral for medical treatment and on October 2, 1991 was taken off work.

Claimant was first referred to Dr. Seglie for physical therapy at Mt. Carmel Hospital and then was referred to Dr. Toma. At Dr. Toma's direction, claimant underwent a work-hardening program. Claimant then returned to work in an accommodated position with respondent in March 8, 1992. Claimant continued in the accommodated position through June 7, 1992 when he left for other employment.

The Administrative Law Judge found that claimant had returned to work at a comparable wage, concluded the evidence did not overcome the presumption of no work disability, and awarded benefits based on a ten percent (10%) permanent partial impairment of function. Claimant argues that he left employment with respondent because of his injury with significant work restrictions, is not able to earn a comparable wage and is entitled to benefits based upon work disability.

The Appeals Board finds claimant should be awarded benefits based upon a work disability. First, claimant did not return to work for respondent at a comparable wage. The Administrative Law Judge based his finding on a comparison of a pre-injury hourly wage to a post-injury hourly wage. This comparison fails to take into account the fact that claimant's post-injury job did not afford overtime. In the pre-injury job claimant earned substantial amounts of overtime pay. The pre-injury average weekly wage was stipulated to be \$341.12. Although the record does not contain information to allow precise calculation of the post-injury average weekly wage, it appears it was approximately two hundred eighty dollars (\$280.00) as reflected in the deposition of Mr. Monty Longacre. This comparison shows an eighteen percent (18%) reduction. Because he did not return to work at a comparable wage, the presumption does not apply. K.S.A. 44-510e.

In addition, the Appeals Board finds claimant left his employment for respondent in significant part because of the residual effects of his injury. The claimant's accommodated position required extended periods of standing. Dr. Toma, the treating physician, gave testimony indicating he would expect claimant to have difficulty standing more than sixty (60) minutes at a time. Claimant testified that he did, in fact, have problems in his employment from standing over periods of time longer than sixty (60) minutes. He left his employment because of the lack of overtime afforded him and because a stool which he had used had been removed. With the removal of the stool, he stood longer and had increased back and leg pain.

Finally the medical testimony supports a finding of significant work restrictions. Two physicians provided testimony. Dr. Toma, the treating physician, diagnosed claimant's injury as a lumbar strain with spasm. He also noted spondylolysis from the x-rays. Based upon an MRI he diagnosed a midline disc protrusion. He rated claimant's impairment at four to five percent (4-5%) general body functional impairment. He did not include any rating for the bilateral spondylolysis or the protruding disc. Although claimant did complain of leg pain to an extent which prompted the MRI exam. He testified that based upon the work-hardening program, claimant could lift ten (10) pounds on a regular basis, thirty (30) pounds occasionally and he could carry twenty (20) pounds twenty (20) feet. He testified that claimant could not stand for more than sixty (60) minutes, but felt he could sit without limitation.

Dr. Revis Lewis, a neurosurgeon who also treated claimant pursuant to a preliminary order, testified in support of his impairment rating of twenty to twenty-five percent (20-25%). He diagnosed claimant's condition as spondylolisthesis at L5-S1 with a bulging disc at that level. He acknowledged that claimant has preexisting spondylosis but testified that condition was aggravated by the work. On the basis of Dr. Lewis' testimony the Appeals Board finds that the claimant's preexisting condition was aggravated and is, therefore, fully compensable. Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

Dr. Lewis also recommended significant restrictions. Specifically he recommended claimant not lift more than ten (10) pounds on a regular basis, twenty-five (25) pounds occasionally. He also recommended claimant avoid lifting more than ten (10) pounds overhead and avoid any lifting in an awkward position. He stated claimant should not bend, twist, stoop or squat more than two to four times per hour and should not kneel or crawl at all. He recommended claimant not walk for more than thirty to sixty (30-60) minutes at a time and avoid walking on uneven surfaces. He restricted sitting and standing thirty to sixty (30-60) minutes at a time. In addition, he limited stair climbing ten (10) minutes with no climbing of ladders. He recommended claimant not drive more than thirty to sixty (30-60) minutes at a time and avoid rough roads, using heavy equipment or driving vehicles without power steering.

From the above summarized evidence the Appeals Board concludes claimant is entitled to benefits based upon a work disability. Two vocational experts testified regarding the effect of the injury on claimant's loss of access to the open labor market and loss of ability to earn a comparable wage. Mr. Jerry Hardin testified claimant lost fifty-five to sixty percent (55-60%) of his ability to obtain or retain employment in the open labor market based on the restrictions of Dr. Revis Lewis. He further testified that if he assumed Dr. Toma's restrictions were permanent restrictions he would find a similar loss of labor market based upon Dr. Toma's restrictions. Mr. Longacre, on the other hand, testified the claimant had a fifty-three percent (53%) loss of ability to perform work in the open labor market based upon the restrictions recommended by Dr. Lewis and forty-six percent (46%) loss of ability to perform work in the open labor market based upon the restrictions recommended by Dr. Toma. By giving approximately equal weight to both the opinions of Mr. Longacre and Mr. Hardin, based upon the restrictions of two physicians, the Appeals Board concludes claimant has a fifty-three and one-half percent (53.5%) loss of ability to obtain and retain employment in the open labor market.

Both Mr. Hardin and Mr. Longacre also gave opinions regarding claimant's loss of ability to earn a comparable wage. The Appeals Board does not find persuasive the ultimate opinions of either. Mr. Hardin testified claimant had a forty-three percent (43%) loss of ability to earn a comparable wage. However, this opinion was based solely on a comparison of a pre-injury wage of three hundred fifty dollars (\$350.00) to a post-injury wage of two hundred dollars (\$200.00) per week. Two hundred dollars (\$200.00) per week was what Mr. Hardin understood claimant was earning in his post-injury employment. The Appeals Board finds this testimony unconvincing for two reasons. First, claimant only speculated as to his post-injury wage. In addition, Mr. Hardin testified that based upon claimant's education background he would expect claimant to be able to earn fifteen to seventeen thousand (\$15,000.00-\$17,000.00) per year. Mr. Longacre, on the other hand, testified claimant had an eighteen percent (18%) loss of ability to earn a comparable wage. This was based upon a comparison to a pre-injury wage of three hundred forty-one dollars (\$341.00) and a post-injury wage of two hundred eighty dollars (\$280.00) per week. The post-injury wage used was the wage in the accommodated position which claimant

temporarily performed and which the Appeals Board finds claimant was unable to continue to perform.

The Appeals Board finds most convincing the testimony of Mr. Hardin that claimant was, in his post-injury employment, underemployed and the conclusion that claimant could be expected to earn between fifteen and seventeen thousand dollars (\$15,000.00-\$17,000.00) per year. Using those figures the Appeals Board finds claimant could be expected in post-injury employment to earn a wage comparable to that he was earning prior to his injury and therefore, finds a zero percent (0%) ability to earn a comparable wage. Giving equal weight to the ability to earn a comparable wage and loss of access to the open labor market, the Appeals Board finds claimant sustained a twenty-seven percent (27%) work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated August 18, 1994, should be, and is hereby, modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Wayne E. Weaver, and against the respondent, Superior Industries International, Inc., as self-insured, for an accidental injury which occurred on September 24, 1991 and based on an average weekly wage of \$341.12 for 21 weeks of temporary total disability compensation at the rate of \$227.42 per week in the sum of \$4,775.82 followed by 394 weeks of compensation at the rate of \$61.40 per week in the sum of \$24,191.60 for a 27% permanent partial work disability making a total award of \$28,967.42.

As of February 29, 1996, there is due and owing claimant 21 weeks of temporary total compensation at the rate of \$227.42 per week or \$4,775.82, followed by 210.43 weeks of permanent partial disability compensation at the rate of \$61.40 per week in the sum of \$12,920.40, making a total due and owing of \$17,696.22.

The remaining balance of \$11,271.20 is to be paid for 183.57 weeks at the rate of \$61.40 per week until fully paid or further order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed to the respondent to be paid direct as follows:

William F. Morrissey

Special Administrative Law Judge	\$150.00
Martin D. Delmont	
Transcript of Preliminary Hearing	\$114.95
Transcript of Regular Hearing	\$ 78.85
Deposition of W.G. Triplett	\$126.95
Deposition of Monty Longacre	\$149.95
Patricia K. Smith	
Deposition of Wayne Weaver	\$224.80
Deposition of Jerry D. Hardin	\$120.85
Deposition of Paul W. Toma, D.O.	\$101.00
Ann K. Morris	
Deposition of Revis C. Lewis, M.D.	\$146.30
Shaun J. Higgins	
Deposition of Ray Kimery	Unknown

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton Kennard, Pittsburg, Kansas
John I. O'Connor, Pittsburg, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director